

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHARLENE AMATO-FLEISHER,

Plaintiff,

vs.

PROGRESSIVE DIRECT INSURANCE
COMPANY, f/k/a PROGRESSIVE HALCYON
INSURANCE COMPANY,

Defendants.

Case No.: 2:08-cv-00567-PMP-GWF

ORDER

**Re: Defendant's Motion to Compel
Second Medical Examination (#19), and**

**ORDER Bifurcating Trial of
Contractual and Bad Faith Claims**

This matter is before the Court on Defendant's Motion to Compel a Second Medical Examination of Plaintiff Charlene Amato-Fleisher (#19), filed on November 4, 2008; Plaintiff's Opposition to Defendant Progressive Direct Insurance Company's Motion to Compel a Second Medical Examination of Plaintiff Charlene Amato-Fleisher (#21), filed November 13, 2008; and Defendant's Reply to Plaintiff's Opposition to Motion to Compel a Second Medical Examination of Plaintiff Charlene Amato-Fleisher (#22), filed November 26, 2008. The Court conducted a hearing in this matter on December 15, 2008.

BACKGROUND

This case involves claims for breach of contract, breach of the covenant of good faith and fair dealing, and violation of the Nevada Unfair Claims Practices Act, NRS 686A.310, arising out of a claim for underinsured motorist coverage benefits. Plaintiff's Complaint was filed in the Nevada District Court on February 26, 2008 and the action was removed to this Court on May 6, 2008. *Notice of Removal* (#4), *Exhibit "A"* ("Complaint").

Plaintiff Charlene Amato-Fleisher ("Amato") allegedly sustained injuries in a motor vehicle accident on August 25, 2005 when the vehicle in which she was a passenger was struck from behind by

1 a vehicle operated by Katie Hayden (“Hayden”). According to the Complaint, as of June 7, 2007,
 2 Amato had incurred medical expenses in excess of \$45,000.00. On April 11, 2007, Dr. Rimoldi, an
 3 orthopedic surgeon, reported that Amato was a candidate for a cervical disectomy and fusion surgery
 4 at C4-5 and C5-6, and that the estimated cost of surgery would be approximately \$85,000.00. Hayden’s
 5 liability insurer, Allstate, paid Amato the \$100,000 limits of its policy. Plaintiff also received the
 6 \$15,000 underinsured motorist coverage limits and the \$10,000 medical expense coverage limits of the
 7 policy that insured the vehicle in which she was riding.

8 Amato was also insured under an automobile policy issued by Defendant Progressive Direct
 9 Insurance Company (“Progressive”) which provided underinsured motorist coverage in the amount of
 10 \$250,000.00 per person and \$500,000.00 per accident. On June 7, 2007, Amato’s attorney sent a
 11 demand letter to Progressive for payment of the underinsured motorist coverage limits of its policy.
 12 *Motion to Compel (#19), Exhibit “B.”*¹ In response to Amato’s policy limits demand, Progressive
 13 requested that Amato submit to a medical examination pursuant to the provision of the policy which
 14 states that “[a] person claiming coverage must: 8. submit to medical examinations at **our** expense by
 15 doctors **we** select as often as **we** may reasonably require.” *Motion to Compel (#19), Exhibit “F.”*

16 Progressive retained Benjamin Venger, M.D., a neurosurgeon, who examined Amato on
 17 November 26, 2007. Based on his examination and review of Plaintiff’s medical records, Dr. Venger
 18 opined that Amato had pre-existing degenerative conditions in the cervical spine which were
 19 exacerbated by the accident. He rated “at least 50% of the patient’s symptoms consistent with her
 20 degenerative changes and 50% related to the accident.” *Motion to Compel (#19), Exhibit “G.”* Dr.
 21 Venger indicated that Dr. Rimoldi’s surgical recommendation was based on a “positive” discogram.
 22 Dr. Venger stated, however, that a CT Scan showed no exacerbation of the discogram dye. He further
 23 stated:

24 The patient is unsure as to whether she wishes to proceed with surgery. I
 25 am somewhat concerned regarding the inconsistency of the discogram in
 26 that the discs appear to be at least normal. This did show degenerative
 changes but no real extravasation of dye. This to me is somewhat

27 ¹Progressive paid Amato’s health care providers the \$10,000 limits of its medical payments
 28 coverage.

1 inconsistent. I am not a great fan of cervical discography. I do not think
2 it is as accurate as lumbar discography. The predominate changes at least
3 on the MRI scan from two years ago and on the most recent CT are
degenerative in nature and I think that the process that she had preceded
the accident.

4 *Id.*

5 In a follow-up December 14, 2007 report, Dr. Venger stated that, in the absence of other
6 findings, he would not recommend that Ms. Amato have cervical spine surgery based on the positive
7 discogram. *Id.*

8 Based on Dr. Venger's reports, Progressive allegedly concluded that Amato did not require
9 cervical spine surgery and that she had been fully compensated for her injuries by the other insurance
10 benefits already paid to her. *Complaint (#4)*, ¶ 23. Plaintiff thereafter filed her instant action on
11 February 26, 2008.

12 In or about March 2008, Dr. Venger testified for the Government at the federal criminal trial of
13 Las Vegas personal injury lawyer Noel Gage, whom the Government alleged engaged in a fraudulent
14 conspiracy with local physicians and others in regard to a medical malpractice lawsuit. Dr. Venger
15 reportedly testified that he conspired with attorney Gage and others to manipulate another case and
16 admitted that he had committed perjury while testifying as a medical expert in other cases. Although
17 Dr. Venger's actual trial testimony has not been provided to this Court, his admission under oath that he
18 has committed perjury has been the subject of news media reports. *See e.g. Motion to Compel (#19)*,
19 *Exhibit "D."* The parties to this case do not dispute the nature of Dr. Venger's testimony in the Gage
20 trial.

21 Following Dr. Venger's testimony in the Gage trial, Defendant's counsel sent an April 8, 2008
22 letter to Plaintiff's counsel notifying him that Progressive was exercising its right under the Policy to
23 request Plaintiff to submit to a second "Independent Medical Examination" ("IME") which Defendant
24 had scheduled with Thomas Dunn, M.D. for April 28, 2008. *Motion to Compel (#19)*, *Exhibit "E."*
25 Defendant's counsel's letter did not provide an explanation why a second examination was being
26 sought. Plaintiff's counsel responded by letter dated April 9, 2008 in which he stated that Dr. Venger's
27 report indicated that he had fully addressed all issues concerning Ms. Amato's condition. He further
28 stated that it was Plaintiff's position that Progressive's breach of the Policy excused Plaintiff's

1 obligation to submit to a second IME absent a court order. *Motion to Compel* (#19), Exhibit "G."

2 According to Defendant's counsel, Dr. Venger has reportedly left the neurological clinic with
3 which he was associated and is no longer practicing medicine. Defendant also states in its Reply (#22),
4 p. 6, that upon calling Dr. Venger's prior office, Progressive was informed that Dr. Venger's coworkers
5 were unaware of his future plans and that he had entered a treatment facility. Defendant also suggests
6 that Dr. Venger's license to practice medicine may be in doubt by virtue of his testimony in the Gage
7 trial. Plaintiff's counsel responds to these assertions by stating that he has seen Dr. Venger out and
8 about town, that he has knowledge of Dr. Venger's address and telephone number which he is willing
9 to provide to Defendant's counsel, and that Plaintiff intends to subpoena Dr. Venger to appear for his
10 deposition regarding his examination of the Plaintiff. *Opposition* (#21), pp. 9-10.

11 Ms. Amato apparently has not yet undergone cervical spine surgery. The Court has not been
12 provided with information whether there has been any material change in her condition since her
13 examination by Dr. Venger on November 26, 2007.

14 DISCUSSION

15 Defendant argues that it should be permitted to obtain a second medical examination of Ms.
16 Amato because Dr. Venger's credibility as a medical expert witness has been destroyed by virtue of his
17 testimony in the Gage case. Defendant also argues that Dr. Venger may be unavailable to testify at trial
18 because he is no longer practicing medicine and because of possible issues with his medical license.
19 Finally, Defendant argues that because a year has passed since Ms. Amato was examined by Dr.
20 Venger, good cause independently exists for a second medical examination.

21 Fed.R.Civ.Pro. 35(a)(1) provides that the court may order a party whose mental or physical
22 condition is in controversy to submit to a physical or mental examination by a suitably licensed or
23 certified examiner. Subsection (a)(2)(A) further provides that the order "may be made only on motion
24 for good cause and on notice to all parties and the person to be examined."

25 In *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 242-43 (1964), the Supreme Court held
26 that the Rule 35 requires an affirmative showing by the movant that the condition as to which the
27 examination is sought is really and genuinely in controversy and that good cause exists for ordering
28 each particular examination. Rule 35 requires discriminating application by the trial judge who must

1 decide in each case whether the party requesting the examination has adequately demonstrated the
2 existence of the Rule's requirements. The Court further noted that there are situations where the
3 pleadings alone are sufficient to meet the requirements: "A plaintiff in a negligence action who asserts
4 mental or physical injury, ... places that mental or physical injury clearly in controversy and provides
5 the defendant with good cause for an examination to determine the existence and extent of such
6 asserted injury." *Id.* at 243.

7 There is no dispute that Plaintiff's cervical spine condition and need for surgery is in
8 controversy. The issue is whether Defendant has good cause to obtain a second medical examination of
9 the Plaintiff. In *Peters v. Nelson*, 153 F.R.D. 635, 637-38 (N.D. Iowa 1994), the court noted that Rule
10 35 does not limit the number of examinations and that a general limitation would not be judicious.
11 Instead, the court stated:

12 Each request for an independent medical examination must turn on its
13 own facts, and the number of examinations to which a party may be
14 subjected depends solely upon the circumstances underlying the request.
15 Even when a previous examination has been ordered in the same case, a
subsequent examination may be ordered if the court deems it necessary.
(internal citations omitted)

16 The court cited various examples which justify a second or additional examinations, including
17 the following: (1) separate injuries calling for examination by distinct medical specialties; (2) where a
18 physician requires assistance of other consultants before he can render a diagnosis; (3) where the first
19 examination was not adequate or complete; and (4) where a substantial time lag occurred between the
20 initial examination and trial. *Id.* at 638. *See also Moore v. Calavar Corp.*, 142 F.R.D. 134, 135 (W.D.
21 La. 1992).

22 The only example cited in *Peters* that arguably applies here is the fact that one year has now
23 passed since Dr. Venger examined Ms. Amato. In this regard, *Edson v. Liberty Mut. Ins. Co.*, Not
24 Reported in F.Supp., 2002 WL 31944902 *1 (N.D. Cal. 2002) states: "As Professors Wright, Miller
25 and Marcus observe, '[I]f permanent injuries are claimed most courts will, on request, allow an
26 additional examination shortly before trial.' Charles Alan Wright, et. al. 8A *Fed. Prac. & Proc.* § 2234,
27 p. 475 (2nd Ed. 1994)." The court stated that good cause for another medical examination existed
28 because two years had elapsed since the prior examination, and plaintiff's condition may have improved

1 since then. *Id.*, citing *Lewis v. Neighbors Constr. Co.*, 49 F.R.D. 308, 309 (W.D. Mo. 1969). *Edson*
2 also noted that “the injured party would not expect to go to trial without an up-to-date examination by
3 his own physician. Upon what logic should the opposing party be denied the right to be equally
4 prepared to present the issue?” *Id.* at *2.

5 The passage of time since Dr. Venger’s examination does not, standing alone, support good
6 cause for a second defense medical examination *at this time*. First, only a little over one year has
7 passed since the examination and this case is not yet approaching trial. Discovery does not expire until
8 April 23, 2009 and the joint pretrial order is not due until June 24, 2009. No trial date has been set.
9 Second, there is no indication of any material change in Ms. Amato’s medical condition, diagnosis or
10 prognosis since the last examination. While a second medical examination may be justified on this
11 ground as the case gets closer to trial, such circumstances are not yet present. Defendant has also not
12 demonstrated that Dr. Venger is or will be physically unavailable to testify at deposition or trial.

13 Obviously, Defendant’s principal reason for requesting another medical examination of the
14 Plaintiff is that Dr. Venger’s credibility as an expert medical witness has been destroyed by his
15 testimony in the Gage case. As Plaintiff’s counsel makes clear in his Opposition (#21), he intends to
16 impeach Dr. Venger’s medical opinion not only on the substantive basis for his medical opinion, or
17 because he is a “hired-gun” for the insurance company, but also because he is an admitted perjurer.

18 Good cause under Rule 35 contemplates that the party seeking a second medical examination is
19 not, itself, at fault in causing the alleged need for a second examination. A party who selects a medical
20 examiner, whom it knows or should know is not qualified or can be readily impeached, is probably not
21 entitled to obtain an examination by another examiner once it realizes its error in selecting the first
22 examiner. Dr. Venger’s testimony in the Gage case did not take place until several months after he
23 performed his examination of the Plaintiff. While Plaintiff argues that Defendant was apparently aware
24 of Dr. Venger’s credibility issues prior to retaining him as an expert, Opposition(#21), p. 6, no evidence
25 has been presented to support this assertion. There is also no evidence that Plaintiff objected to
26 Defendant’s selection of Dr. Venger as the examiner based on his allegedly known record of providing
27 false medical opinions.

28 . . .

1 This is also not a case in which the Defendant appears to desire a second examination because it
2 is unsatisfied with the opinion it received from the first examiner. Dr. Venger stated that Plaintiff did
3 not require cervical spine surgery based on his examination and review of her medical records and
4 diagnostic studies. There is no reason to believe that Defendant would have sought another opinion
5 from a second physician, but for Dr. Venger's subsequent testimony in the Gage case which fatally
6 poisons his credibility as an expert witness in this or any other case.

7 The impartiality of medical experts who are retained and paid by the litigants is debatable and is
8 a ripe subject for impeachment at trial. Dr. Venger's reported testimony in the Gage case is sad
9 evidence of the corruption of expert testimony that exists in our legal system. Nevertheless, there is no
10 basis for concluding that Defendant should have anticipated Dr. Venger's testimony in the Gage case
11 which has destroyed his credibility as a medical expert witness. Nor will the Court presume that Dr.
12 Dunn, whom Defendant proposes to conduct a second examination of Ms. Amato, will not render a fair
13 and reasonable opinion regarding her medical condition and potential need for surgery. Dr. Dunn will,
14 of course, have to consider the same medical evidence that Dr. Venger considered in rendering his
15 medical opinion (as well as any new information that may have developed since the last examination)
16 because the reason for granting a second examination is Dr. Venger's total loss of credibility as an
17 expert. This obviously disposes of Plaintiff's argument that the second examination should also be
18 performed by Dr. Venger.

19 The Court therefore concludes that good cause exists for permitting Defendant to obtain a
20 second medical examination of Plaintiff by Dr. Dunn pursuant to Fed.R.Civ.Pro. 35. The Court also
21 finds that permitting Defendant to obtain another medical examination of Plaintiff's cervical spine
22 condition and need for surgery promotes the public interest that Plaintiff's contractual claim for policy
23 benefits be decided on its merits.

24 Plaintiff, however, has a legitimate concern that if Defendant is permitted to obtain a second
25 medical examination and opinion by Dr. Dunn, Plaintiff could be placed in the unfair position of having
26 to overcome the opinions of two defense-retained neurosurgeons in order to prove her contractual claim
27 for underinsured motorist benefits. Dr. Venger's examination and opinions are also relevant and
28 admissible evidence in regard to Plaintiff's claims that Progressive breached its duty of good faith and

1 fair dealing and violated NRS 686A.310 in denying her claim for underinsured motorist coverage
2 benefits in January 2007, (hereinafter the “bad faith” claims).

3 The parties agreed at the hearing on this motion that these legitimate concerns can be resolved
4 by bifurcating the trial of Plaintiff’s contractual and bad faith claims. In *Drennan v. Maryland*
5 *Casualty. Co.*, 366 F.Supp.2d 1002, 1007-08 (D.Nev. 2005), the court held that bifurcating the trial of
6 the contractual and bad faith claims was appropriate because it could potentially avoid the need for trial
7 on the bad faith issues, would simplify the issues and avoid the possibility of undue prejudice by
8 allowing the jury to hear evidence of bad faith only upon establishing that the insurer breached the
9 contract. The unusual circumstances that have arisen regarding Dr. Venger’s credibility as a medical
10 expert provide additional grounds for bifurcation of the trial in this case.

11 CONCLUSION

12 Based on the foregoing, the Court will grant Defendant’s request for a medical examination of
13 Plaintiff by Dr. Thomas Dunn and will order that trial shall be bifurcated. Plaintiff’s breach of contract
14 claim for underinsured motorist coverage benefits shall first be tried to the jury. Evidence regarding Dr.
15 Venger’s examination, opinions or reports shall not be introduced in evidence by either party during the
16 breach of contract phase of the trial.² Nor will either party’s witnesses or counsel make reference to Dr.
17 Venger during the breach of contract phase of the trial. Dr. Dunn shall also not make any reference in
18 his report or in his testimony to Dr. Venger’s examination or opinions during the breach of contract
19 phase of the trial.

20 After the jury renders its verdict on the breach of contract claim, trial of Plaintiff’s “bad faith”
21 claims shall proceed, if necessary, before the same jury. During this second phase of trial, evidence
22 regarding Dr. Venger’s examination, reports and opinions, as well as evidence relating to his
23 impeachment, may be admitted as they relate to Plaintiff’s claim that Defendant acted in bad faith or
24 breached its statutory duties under NRS 686A.310 by denying Plaintiff’s demand for the payment of
25 underinsured motorist coverage benefits. Accordingly,

26
27 ²If, for example, Dr. Dunn renders a medical opinion that is more favorable to Plaintiff’s
28 contractual claim than was Dr. Venger’s opinion, Defendant will not have the option of introducing Dr.
Venger’s opinions or testimony in defense to Plaintiff’s breach of contract claim.

IT IS HEREBY ORDERED that Defendant's Motion to Compel a Second Medical Examination of Plaintiff Charlene Amato-Fleisher (#19) is **granted** subject to the following orders:

1. Evidence or argument regarding Dr. Venger's examination, opinions or reports shall not be introduced in evidence by either party during the breach of contract phase of the trial, but may be introduced in evidence in the bad faith portion of the trial as described in the foregoing order.

2. The parties shall agree on a date for the medical examination of Plaintiff by Thomas Dunn, M.D. in accordance with the provisions of Fed.R.Civ.Pro. 35 and consistent with the scheduling order in this case.

IT IS FURTHER ORDERED that Plaintiff's breach of contract claim for underinsured motorist coverage benefits shall be first tried to the jury. After the jury renders its verdict on Plaintiff's breach of contract claim, the trial of Plaintiff's claims for breach of the covenant of good faith and fair dealing and for violation of NRS 686A.310 shall proceed, if necessary, before the same jury.

DATED this 16th day of December, 2008.

George Foley Jr.
GEORGE FOLEY, JR.
United States Magistrate Judge